IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 886 of 1996

in

SPECIAL CIVIL APPLICATIONNo 8945 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE R.A.MEHTA and
MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

RAJESH CHANDULAL PUROHIT

Versus

SAURASHTRA UNIVERSITY

Appearance:
MR DD VYAS for Appellant

CORAM : MR.JUSTICE R.A.MEHTA and
MR.JUSTICE M.S.SHAH

Date of decision: 03/10/96

ORAL JUDGMENT(Per:M.S.Shah,J.)

This Letters Patent Appeal is directed against the judgment and order dated 5th July 1996 of the learned

single Judge dismissing Special Civil Application No. 8945 of 1995 which was filed by the appellant student challenging the order of penalty passed by the respondent- Saurashtra University in respect of the misconduct committed at the T.Y.B.Com.examination.

2. On 8th April 1995, the TYBCom examination in the subject of Statistics was held. The appellant was one of the students who appeared at the said examination from Porbandar Centre. University Observer Mrs. N.K.Trivedi sent by the respondent-University submitted report dated 8th April 1995 pointing out that certain students at the above examination centre had collected their answer books from the supervisor, but at the time of checking, the students themselves were not found to be present in the examination hall nor had they returned the answer books to the supervisor. The Observer had, therefore, instructed the supervisor to mark "absent" against the seat numbers of the concerned students and thereafter she had put her initials against such entries in the stationery report. She further stated that according to her information, the above students were writing their answer books outside the examination halls. The Observer had also mentioned in her report the seat numbers of 12 students who were absent and had not collected the answer books from the supervisor; she had also mentioned the seat numbers of 37 students who had collected the answer books from the supervisor, but were not present in the examination halls of the above centre and who had not returned their answer books to the Supervisor. The appellant with seat no. 3457 was one of the said 37 students. The result of the said 37 students including the appellant was kept in abeyance when the results were declared in June 1995.

3. Ultimately, a show cause notice was issued to all the above 37 students including the appellant on 17th November 1995 alleging that at the examination held on 8.4.1995, the petitioner had collected the answer book from the supervisor, but during the checking carried out by the Observer, the appellant was found to be absent in the examination hall; the appellant had left the examination hall without handing over to the supervisor the main answer book which was given to the appellant for writing answers. Subsequently, the answer book was handed over for assessment. Thus, the allegation was to the effect that the appellant had committed misconduct of writing the answer book outside the examination hall. The notice also referred to the provisions of Ordinance 160 A and 161 AA of the University.

4. Para 7 of the show cause notice had specifically informed the appellant that if he wanted to see any report or literature in connection with the case, the appellant could take inspection on any day, prior to the day of personal hearing during office hours. The appellant did not avail of the said opportunity, but submitted his reply dated 24.11.1995 contending that he had remained present in the examination hall for examination in all the subjects. The appellant further contended that a false case was put up against the appellant for covering up the mistake arising from the negligence of the University authorities. The appellant specifically requested the University authorities only for a copy of Ordinance 160 A and Ordinance 161 AA under which the inquiry was held.

5. In response to the above request, the University supplied a copy of the provisions of Ordinance 160-A and 161-AA on 30.11.1995. The appellant received the same on 1.12.1995. Thereafter, the appellant received a telegram to remain present before the inquiry committee on 5th December 1995 for hearing. On that day, the statement of the observer was recorded by the inquiry committee. She stated that the appellant was not found to be present in the examination hall, the answer book which was earlier given to the appellant as mentioned in the stationary sheet, was not available with the junior supervisor, similarly there were were some other students also who were found to be absent, but the answer books given to them were not available with the junior supervisor. She, therefore, asked the junior supervisor to mark "Absent" against the said seat numbers and thereafter she had initialled those entries made by the junior supervisor. She further stated that she had instructed the supervisor in charge of the examination centre that the answer books of such students should not be sent alongwith answer books of the students who were present in the examination hall. However, there was hue and cry raised by the students and rowdyism started in as much as telephone wires were snapped. Hence, the supervisor had suggested that the answer books of even such students would have to be sent alongwith other answer books; otherwise, more serious rowdyism would take place. Looking to the situation prevailing in Porbandar, the observer had no other alternative but to agree to the said course of action and ultimately, she submitted the above report.

6. In his statement before the examination committee, the appellant in terms admitted that he had no dispute with the observer and that there was no reason why the observer would make any incorrect report against

the appellant. The appellant also stated that the observer's report was read out to him, but he declined to cross examine the observer on the ground that he would like to take the legal opinion of his advocate. Subsequently, he submitted a typed letter contending that he could not cross examine the Observer as the report was not given to him.

7. After recording the evidence of both the parties, the inquiry committee submitted its report and found the appellant guilty of the misconduct alleged against him, Ultimately, the order of penalty was passed to the effect that the appellant's examination held in April 1995 was cancelled and the appellant was debarred from appearing at TYBCom examination till June 1996.

8. In view of his result having been kept in abeyance, in June 1995, the present petition was already filed by the appellant even before initiation of the aforesaid disciplinary proceedings. In response to the notice issued by the learned single Judge, the respondent University appeared. After taking into consideration the submissions made by the learned Counsel for the parties and the affidavit in reply filed on behalf of the respondent University, the learned single Judge dismissed the petition by judgment dated 5th July 1996.

9. At the hearing of the appeal, Mr.Vyas, learned Counsel for the appellant has pressed the following contentions which he had also raised before the learned single Judge:-

(1) The inquiry was vitiated on account of gross delay in issuing show cause notice to the appellant;

(2) The inquiry was also vitiated on account of non supply of copy of observer's report dated 8th April 1995.

10. As far as the first contention is concerned, Mr. Vyas submitted that the result was declared on 27th June 1995, but the show cause notice was issued to the appellant on 17th November 1995, after the appellant filed the present petition against the decision of the University keeping his result in abeyance. Hence, there was gross delay in initiating the inquiry.

In this connection, one cannot lose sight of the fact that the University authorities are required to deal with a large number of cases involving use of unfair

means at the examination. At this very centre i.e. one college in Porbandar, Observation Team had detected cases of as many as 37 students who had collected their answer books from the supervisor and thereafter written the answers outside the examination hall and subsequently the centre authorities were compelled to accept the answer books in view of the rowdyism of the students. In view of the facts

single Judge that the delay in initiating inquiry in the instant case cannot be said to be so unreasonable as to vitiate the inquiry.

11. As far as the second contention is concerned, Mr. Vyas contended that non supply of copy of observer's report dated 8th April 1995 was violative of the principle of natural justice (audi alteram partem) as well as in breach of the provisions of Ord.161-AA (3)(iii)(d).

The learned single Judge has observed that though it would have been better if a copy of the report had been made available to the appellant, however, non supply of the said report did not affect the merits of the case as apart from the report, the statement of the observer was recorded in presence of the appellant.

12. As regards the above contention of the appellant, we called upon Mr.Vyas to address us in light of the principles laid down by the Supreme Court regarding disciplinary proceedings, in the case of State Bank of Patiala Vs. S.K.Sharma, (1996) 3 SCC 364. Their Lordships have held that whenever a grievance is made regarding violation of principles of natural justice or breach of procedural rules governing disciplinary inquiries, such violation even when proved, does not automatically vitiate the order of penalty, but a distinction must be made between two categories of cases as under:-

(i)cases where disciplinary action is taken without giving any notice or hearing which may be said to be a case of "no notice/no hearing" or "no opportunity". For instance, where a person is dismissed from service without hearing him altogether (as in Ridge Vs.Baldwin). In such a case, the order of dismissal would be invalid or void on account of violation of the principle of natural justice audi alteram partem.

(ii) Cases where there is hearing, but not adequate hearing which may be termed as a case of "no

adequate opportunity" or "no proper hearing".. For instance, where a person is dismissed from service, say without supplying him with a copy of the inquiry officer's report or without affording him due opportunity of cross examining witnesses. In such a case, since violation is only of a facet of the principle of natural justice, the order of penalty would not be bad per se, but the validity of the order has to be decided on the touchstone of prejudice i.e.whether, all in all, the person concerned did or did not have a fair hearing.

13. The apex Court has thus made a vital distinction between violation of.R

such (audi alteram partem)on the one hand and violation of a facet of such principle on the other hand. There is, therefore, a material and significant distinction, between "no notice", "no hearing", and "no opportunity on one hand and "absence of proper or adequate hearing" on the other hand. Their Lordships have also supplied the rationale for making this important distinction by observing that the ultimate and overriding objective underlying the rule of audi alteram partem (the primary principle of natural justice)is to assure a fair hearing and to ensure that there is no failure of justice.

> "Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities .R
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> irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise."

Section 99 of Civil Procedure Code and section 465 (1) of Criminal Procedure Code also embody the same principle. The universal principle of justice that an innocent person should not be punished still remains fundamental to our jurisprudence;the only rethinking is on the questioin whether it was at all necessary in the first place to say "let ninety nine guilty persons be acquitted, but..."!

14. As stated above, where the grievance is made regarding non supply of inquiry officer's report or not affording the delinquent due opportunity of cross examining witnesses, such cases fall in the second category and in

such cases, the validity of the order must be tested on the touchstone of prejudice.i.e. the prejudice will have to be shown and will not be assumed.

The entire record of the inquiry was before the learned single Judge and we have also perused the material on record. In the first place, the appellant had not asked for a copy of the report before the hearing nor did he availof the opportunity to inspect the record before the date of hearing. Moreover, the learned Counsel for the appellant could not point out the prejudice suffered by non supply of the Observer's report dated 8th April 1995 in advance, except stating that the appellant could not cross examine the Observer. Nothing is pointed out even after the report having been read out at the hearing and a copy made available during the hearing of the petition as to what prejudice the appellant suffered. In our opinion, adopting the test laid down by Their Lordships in the aforesaid judgment, it cannot be said that any prejudice was caused to the appellant by non supply of the copy of oberver's report dated 8th April 1995 in advance. The appellant was very much aware of the misconduct alleged against him; the observer's report was also read out to him at the hearing and the Observer was examined in presence of the appellant; at the hearing,the appellant admitted in terms that the Observer had no dispute with or ill will against the appellant. All in all, it cannot be said that the appellant did not have a fair hearing.

15. As far as the grievance on the score .R

of the relevant provisions of the Ordinances is concerned, it would be necessary to set out the relevant extract of the provisions.

> "Ord.161-AA :
> xxxxx
> (3):It will be the duty and the function of the Committee to inquire into the charges, regarding misconduct in accordance with the procedure mentioned hereunder and to give a decision at the end of the enquiry in which the charges against the candidates may be held proved or not proved and suitable punishment awarded where a charge is held proved;
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> xxxxxx
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> (iii):in the letter communicating the charge, the Registrar shall communicate to the candidate charges that the following opportunities for defence will be made available to him if he chooses to avail of any one or more o.R

(a) to (c) xxxxxxx

(d):that at the time of hearing, he may cross examine any person on the basis of whose complaint or report, he has been chargesheeted and a copy of which has been sent to him; unless in the opinion of the Committee, such cross examination is not necessary ; and

(e): xxxxxxx

(iv):In case of failure of the candidate to avail of any of opportunities as mentioned above, it will be presumed that he does not want to avail of that opportunity.

Mr.Vyas submitted that the aforesaid provisions contemplate that a copy of the complaint/ report dated 8th April 1995 sent by the Obeserver was required to be served upon the appellant well in advance and that on account of non supply of the said report, there was a clear breach of the aforesaid provisions of the said Ordinance.

16. Even in respect of such contention based on rules, the Apex Court has laid down in the aforesaid judgment that when a grievance is made regarding the violation of procedural rules/ regulations governing such inquiries, violation per se does not entail automatic setting aside of the inquiry or the penalty order:
(i) The Court or the Tribunal has to inquire as to whether the provision violated is of a substantive nature (e.g.rule prescribing who is the competent authority to impose particular punishment on a particular employee) or procedural in character. Substantive provisions must be strictly complied with.
(ii) Further inquiry in case of a procedural provision would be whether there was a waiver of such rule/ regulation by the delinquent. Procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent to defend himself and are, therefore, conceived in his interest, whether mandatory or directory. Hence, the delinquent can waive it either expressly or by his conduct. Only if there is no waiver, further scrutiny is required to be made.
(iii) Even amongst procedural provisions,there may be some proisioins of such fundamental nature that their violation would fall under "no notice", "no opportunity", "no hearing" category.
The violation of such procedural provision of

fundamental character is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases e.g. where there is a provision expressly providing that after the evidence of the department is over, the delinquent shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent asking for it. The prejudice is self-evident. No proof of prejudice as such need becalled for in such a case.

(iv) In respect of procedural provisions other than that of a fundamental nature, grievance regarding violation of such rules has to be judged on the touchstone of prejudice viz. "all things taken together whether the delinquent had or did not have fair hearing."

The denial of opportunity to cross examine has been held to be falling in the category of "no adequate hearing" and not in the category of "no hearing". The Apex Court has in terms explained that procedural provisions for disciplinary inquiries are nothing but elaboration of the principles of natural justice and codification of their several facets. Hence, the same basic principle is applicable whether the grievance is made on account of violation of procedural rules or on account of violation of the principle of audi alteram partem.

17. Applying the aforesaid tests, we have no hesitation in holding that in the instant case, the violation of the procedural rule does not fall in the first category i.e. "no notice", "no opportunity" and "no hearing", but it falls in the second category where the grievance is of "no proper hearing". Hence, the validity of the impugned decision has to be decided on the touchstones of waiver and proof of prejudice. The appellant's grievance is with regard to the non supply of a copy of the report dated 8th April 1995 which resulted into initiation of inquiry against the appellant and others. The appellant never requested for a copy of any such report. As a matter of fact, the appellant only requested for a copy of the relevant Ordinance which was supplied to the appellant very soon. The appellant should fail on the ground of waiver, but we have examined the grievance independently on the touchstone of prejudice also.

18. The report was read over to the appellant and the statement of the author of the report was recorded in presence of the appellant. The appellant even admitted that the Observer had no ill will against the appellant nor any dispute with the appellant and that there was no reason why the Observer would give any incorrect statement or report against the appellant.The said report was also very much a part of the record before the learned single Judge

and is also before us. As discussed earlier, the learned Counsel could not show what prejudice was caused to the appellant on account of a copy of the report not having been given to the petitioiner in advance. We are satisfied that on account of the said violatioin, it cannot be said that the appellant did not have a fair hearing.

19. Mr.Vyas lastly contended that the appellant's case was wrongly mixed up with the cases of other delinquents. We are afraid, the contention deserves to be rejected. In the first place,the contention was not raised before the learned single Judge. Secondly, the appellant himself had admitted before the inquiry committee that the Observer had no prejudice against the appellant or dispute with the appellant.Thirdly,the appellant was the only student in the block (no.8) who was found to be absent when the Observer visited the place and all the remaining 19 students in that particular block were found to be present. Hence, there was not even a possibility of any inadvertant mistake as alleged by the learned Counsel for the appellant. Reliance placed by the appellant on the certificate dated 5th June 1995 of Prof.A.H.Trivedi is of no consequence, as the author thereof was not examined by the appellant as his witness.

20. Looking to the nature of the misconduct alleged against the appellant and also found to have been proved and the overall facts and circumstances of the case, we are satisfied that the impugned decision of the respondent University cannot be faulted in exercise of our jurisdiction under Article 226 of the Constitution.

21. In view of the aforesaid discussion, there is no merit in any of the contentions. The appeal, therefore, fails and is hereby summarily rejected.
